IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 453

JOHN McMILLAN GREGG,
Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INDEX

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE
UNITED STATES DISTRICT COURT
Western District of Kentucky
at Louisville

THE UNITED STATES

v.

Criminal Docket
No. 26745

JOHN McMILLAN GREGG
ROBERT JOSEPH SATTERFIELD

18 USC 2114
ARMED ASSAULT OF POSTAL EMPLOYEES
1 Count

* * *

RELEVANT DOCKET ENTRIES

Sept. 26, 1966 – Indictment returned and filed.

Oct. 6, 1966 – Order signed by Judge Gordon 10/4/66: This case continued until further orders.

March 22, 1967 – Order signed by Judge Gordon 3/20/67 that case is passed until April 10, 1967 at 9:30 A.M.

April 11, 1967 – Order (Arraignment) signed by Judge Brooks 4/11/67 that psychiatric report of the Medical Center in Springfield, Mo. was filed in open court. Deft's motion for a competency hearing subsequent to examination by a private psychiatrist is denied and case is set for jury trial 5/23/67.

April 10, 1967 – Psychiatric report filed in open court.

April 18, 1967 – Gregg Motion for Bill of Particulars; Motion to Dismiss Indictment of Defendant, John McMillan Gregg, and Objections to the Array of the Grand Jury; Motion to Inspect the Minutes of the Grand Jury; Motion of Defendant, John McMillan Gregg, Under Rule 16 for Discovery and Inspection; Brief in Support of Motion for Disclosure of Matters Occurring Before the Grand Jury,

Including Evidence Presented by United States of America; Brief in Support of Motion of Defendant, John McMillan Gregg, Under Rule 17 To Produce - filed by Dean E. Richards, Atty. for Defendant, Gregg.

April 20, 1967 - Gregg Entry of Appearance of Louis J. Hollenbach, III as associate Local Counsel for defendant, Gregg filed.

April 26, 1967 - Motion for Extension of Time in which to file Response to def's Gregg Mos. for Bill of Particulars, To Dismiss Indictment, To Inspect Minutes of Grand Jury, for Discovery and Inspection, Brief in Support of Mo. to Produce and Brief in Support of Mot. for Disclosure, etc. - filed by U.S. Atty.

April 28, 1967 - Order signed by Judge Brooks 4/28/67: Motion to dismiss indictment and objections to array of Grand Jury denied and overruled, respectively; Motion for discovery under R. 16, F. R. Cr. P. sustained, only to the extent permitted by R. 16 and not otherwise. Time, place and manner of making discovery and inspection as permitted by Rule, if it cannot be agreed upon by the parties, shall take place in the office of the U.S. Atty. at Louisville on Mon. May 8, 1967, at 9:30 a.m. Copies to Messrs. Huddleston and Richards April 28, 1967.

May 5, 1967 - Letter from U.S. Attorney transmitting copy of letter from U.S. Attorney to Dean E. Richards, attorney for defendant Gregg, disclosing certain information requested by counsel for defendant.

May 11, 1967 - Praecipe for subpoena for W. M. Kelly, Finance Examiner, Post Office, received; spoe. issued and delivered to U.S. Marshal.

May 11, 1967 - Praecipe for spoes. as to L. P. Oliver, J. R. Dibowski, W. L. Sumner, Jr., Fontaine Rodman, Mrs. Effie Smith, Mrs. Grace Smith, Tommy E. Cauthen, Warren P. Delp, Sgt. A. L. Price, Frank J. Anderson, and Michael W. Stuart - filed by U.S. Spoes. issued and delivered to Marshal 5/11/67.

May 15, 1967 - Defendant's Motion for Continuance and notice of hearing thereon on May 19, 1967, filed; proposed order tendered.

May 16, 1967 - Spoe. as to W. M. Kelly returned executed.

May 16, 1967 - Spoes. as to Mrs. Grace Smith and Mrs. Effie Smith returned executed.

May 17, 1967 - Spoe. as to Fontaine Rodman returned executed.

May 22, 1967 - Order signed by Judge Brooks continuing this case until May 31, 1967, at 9:30 a.m. Copies to Messrs. Rivers, Richards and Hollenbach 5/22/67.

May 22, 1967 - Praecipe for spoes. as to L. P. Oliver, J. R. Dobowski, W. L. Sumner, Jr., Fontaine Rodman, Mrs. Effie Smith, Mrs. Grace Smith, Tommy E. Cauthen, Warren P. Delp, Sgt. A. L. Price, Frank J. Anderson, Michael W. Stuart and W. M. Kelley. Spoes. issued and delivered to Marshal 5/22/67.

Spoes. (of 5/22) as to W. L. Sumner, Jr., Mrs. Effie Smith, L. P. Oliver, Mrs. Grace Smith, Frank J. Anderson, Sgt. A. L. Price, Tommy E. Cauthen, Michael W. Stuart.

May 23, 1967 - Spoe. as to Fontaine Rodman returned executed.

May 24, 1967 - Spoe. as to W. M. Kelley and W. L. Sumner (5/10) returned executed.

May 25, 1967 - Spoes. as to Warren Delp (2), Michael Stuart, Frank J. Anderson, L. P. Oliver ret'd executed.

May 26, 1967 - Spoe. as to J. R. Dibowski returned executed.

May 31, 1967 - Motion to Suppress Evidence and Motion to Dismiss Indictment filed by Dean E. Richards and Louis J. Hollenbach, III.

May 31, 1967 - Motion for Directed Verdict (Judgment of Acquittal) filed by atty. Richards in open court.

May 31, 1967 – Verdict filed, returned in open court, and read by the foreman as follows:

"We, the Jury, find the defendant, John McMillan Gregg, Guilty as to Count One of the indictment.

May 31, 1967 (Date) — Mrs. A. C. Dearing, Jr. (Foreman)

June 1, 1967 – Judgment and Commitment entered by Judge Gordon reflecting above jury verdict of guilty, and sentence imposed by Court of 25 years on count one of the indictment. Cys. sent to Probation Office, U.S. Marshal, and U.S. Atty.

June 1, 1967 – Trial Order entered by Judge Brooks, reflecting above verdict; cys. sent to U.S. Atty., Mr. Richards and Mr. Hollenbach.

June 1, 1967 – Spoes. returned executed as to Sgt. A. L. Price & Tommy Cauthen.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

ORDER

This case was called in open court on April 10, 1967, and there appeared Phillip Huddleston, Assistant United States Attorney, and the defendant, John McMillan Gregg, in person and by his counsel, Dean E. Richards, Indianapolis, Indiana.

Defendant's identity was acknowledged and he was furnished a copy of the indictment and advised of the nature of the charges against him. Formality of arraignment was waived and a plea of NOT GUILTY was entered as to the one count of the indictment.

The psychiatric report of the Medical Center for Federal Prisoners at Springfield, Missouri, was filed in open court. Defendant's motion for a competency hearing subsequent to examination by a private psychiatrist is denied, and this

case is set for trial before a jury on May 23, 1967, at 9:30 a.m.

Dated: April 11, 1967.

/s/ Henry Brooks
United States District Judge

TRANSCRIPT OF THE PROCEEDINGS

VERDICT OF THE JURY AND SENTENCING BY THE COURT

BY THE COURT: Ladies and gentlemen, have you arrived at a verdict in this case?

FOREMAN OF THE JURY: Yes, Your Honor.

BY THE COURT: Mrs. Dearing, will you read the verdict of the jury?

FOREMAN OF THE JURY: We, the Jury, find the defendant, John McMillan Gregg, guilty to count one of the indictment.

BY THE COURT: I'll ask each individual juror if that's your verdict?

(WHEREUPON, ALL JURORS INDICATE AFFIRMATIVELY.)

BY THE COURT: Members of the jury, I have lost my note as to when you should come back. Will you check it and will you just resume your seats in the courtroom.

Now, wait just one minute, ladies and gentlemen. Will counsel acknowledge that all members of the jury are in the courtroom and were at the time that the verdict was read and that each of them individually was polled?

MR. RICHARDS: Yes, Your Honor.

MR. HUDDLESTON: Yes, Your Honor.

BY THE COURT: Well, thank you very much. Each of you resume your seats in the courtroom. Let the defendant come forward.

(WHEREUPON, THE DEFENDANT AND HIS COUNSEL STAND BEFORE THE COURT.)

BY THE COURT: This defendant has been found guilty by a jury. Does the United States have a recommendation?

MR. HUDDLESTON: Your Honor, there is a mandatory 25 year imprisonment.

BY THE COURT: Yes. And the only way that verdict can be changed in any way would be by probation, and in no other way can it be varied. It's compulsory under the law that a defendant found guilty of this charge, as this defendant has been found guilty, must receive a 25-year penalty.

Now, does the defendant or his counsel have anything that they wish to say before sentence is imposed?

MR. RICHARDS: Yes, Your Honor, I would like to ask the mercy of the Court. John McMillan Gregg has been found guilty of this charge against him today. John Gregg is married, his wife is pregnant, he's got a tremendous—he's got a great number of years to serve in the Federal penitentiary on the crime that he has just now been found guilty of.

We would like, and ask the mercy of the Court, that Mr. Gregg be released upon the bond that he has and until he reports to where the—to the Marshal's office to start serving his sentence Monday of this week, at least go home, make arrangements, tell the wife and kids, his wife goodbye, to get her set up. And I don't feel that he has—he has shown that he will appear in this court at any time. He's got another bond against him. He's not about to run. He has no record of running. He'll be here, and we ask the Court's mercy of giving this man three or four days before he starts serving the years and years that he has facing him in prison, to go home and spend a few days with his wife. I don't feel that this is such a great burden upon the Court to let Mr. Gregg do this.

BY THE COURT: Gregg, do you have anything you wish to say to the Court?

MR. GREGG: Yes, Your Honor. If I can go home just to get my wife straightened out and get all my—get all my bills taken care of. I'm not going to run. I never have before, and I'm not going to start now.

BY THE COURT: Well, you've known for almost a year now what was going to happen, and you should have prepared for it and not waited until the last minute.

MR. RICHARDS: Your Honor, I would like to ask that a pre-sentence investigation be made of—

BY THE COURT: (Interrupting) A pre-sentence investigation has been made. It is before me now, and I have read it. It shows a juvenile record. It shows in 1960 this defendant stole an automobile in violation of the Dyer Act and was given an indeterminate youth commitment sentence. He was paroled in 1965. He was returned—no, he was paroled in '62, returned as a parole violator in '65 and was not released full time until May of last year.

I am also informed that he was convicted of armed robbery in Yuma, Arizona, and given from seven to ten years. Several warrants are now pending against him for robbery with which he is charged.

It will be the judgment of this Court that this defendant be sentenced to the mandatory 25 years. Custody of the Marshal.

* * *

No. 18,150

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed June 18, 1968]

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JOHN McMILLAN GREGG
Defendant-Appellant

ORDER

Before WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

Appellant has no standing to question the search of a closet in an unrented room of a motel where he was hiding when he was arrested. In our judgment, the officers had probable cause to make the arrest and the search was incident thereto.

Nor do we find any prejudicial error in the conduct of the trial or in the Court's instructions to the jury. Venue was proven.

There is no basis for inferring prejudice from the facts that the District Judge had seen the pre-sentence investigation report prior to the time when the jury returned its verdict and that the District Judge sentenced defendant immediately thereafter. *Calland v. United States*, 371 F.2d 295 (7th Cir. 1966) *cert. denied*, 388 U.S. 916.

The judgment of conviction is affirmed.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

[Filed July 8, 1968]

PETITION FOR REHEARING OR REHEARING IN BANC

TO THE HONORABLE PAUL C. WEICK, CHIEF JUDGE, AND THE HONORABLE HARRY PHILLIPS AND GEORGE EDWARDS, CIRCUIT JUDGES:

This is a petition of, by and for John McMillan Gregg to order a rehearing or a rehearing in banc of the appeal from a judgment of conviction in the United States District Court for the Western District of Kentucky, entered on May 31, 1967, the same day that petitioner's trial by jury began and concluded, adjudging petitioner guilty of placing lives in jeopardy in perpetrating a postal contract station robbery and sentencing him to imprisonment for a term of twenty-five years. The said judgment was affirmed by this Court on June 18, 1968, by the entry of an order without opinion.

* * *

[Filed July 26, 1968]

ORDER

Before WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

Upon consideration of the petition for rehearing it is ordered that said petition be and it is hereby denied. We decline to consider a claimed error in District Judge's instructions to the jury which was not raised in the District Court, or in this Court, when the appeal was heard and decided. Rules 30 and 52, Fed.R.Crim.P.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

Supreme Court of the United States

No. 453 —, October Term, 1968

John McMillan Gregg,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed November 12, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, limited to the questions raised in the case with respect to Rule 32 (c)(1) of the Federal Rules of Criminal Procedure and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PETITION FOR A WRIT OF CERTIORARI

No. 453

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1968

JOHN McMILLAN GREGG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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AUTHORITIES CITED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1968

No.

JOHN McMILLAN GREGG

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Sixth Circuit which affirmed the Judgment of the United States District Court for the Western District of Kentucky finding Petitioner guilty of the crime of assault upon persons having lawful custody of a postal contract station with intent to rob them of money or property in their possession by putting the lives of said persons in jeopardy, in violation of Title 18, United States Code, Section 2114a and sentencing him to a term of twenty five years in the penitentiary

which term the Petitioner presently is serving in a federal prison.

THE OPINION BELOW

The United States Court of Appeals for the Sixth Circuit decided this case without a printed opinion. The Court's order deciding this case is set forth in Appendix A hereto. A Petition For Rehearing was timely filed and the same was denied on July 30, 1968.

STATEMENT OF JURISDICTION

The decision and judgment of the United States Court of Appeals for the Sixth Circuit without printed opinion was entered on June 18, 1968. A petition for rehearing was then filed within the time allowed by the rules of the said lower court and the same was denied on July 30, 1968.

The statutory provision believed to confer upon this Court, jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a convicted defendant is entitled to a new trial where the presiding judge has head his pre-sentence report prior to the end of his trial contrary to the express provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure and there is nothing in the record to rebut any presumption of prejudice. To this question the Seventh Circuit has answered "yes" in *Calland* v. *United States*, 371 F.2d 295, 296 (1966) while the Sixth Circuit has answered "no" where the issue was presented in Petitioner's cause.

2. Whether it constitutes a deprivation of due process of law and a prejudicial violation of Rule 30 of the Federal Rules of Criminal Procedure for a trial court to submit a criminal defendant's cause to the jury upon a charge which does not state the elements of the offense, regardless of whether such instructions are specifically requested by the defense, particularly where the opportunity to make a tender is not fairly given and the defense is asked in the presence and hearing of the jury if it has any objections to the court's charge. To this question the Fifth Circuit has answered "yes" in *Merrill* v. *United States,* 338 F.2d 763, 767 (5th Cir. 1964) and the D.C. Circuit has answered "yes" in *Byrd* v. *United States,* 342 F.2d 939, 940, 941 (D.C. Cir 1966) and the Fourth Circuit has answered "yes" in *United States* v. *Harris,* 346 F.2d 182, 184 (4th Cir. 1965) while the Sixth Circuit has answered "no" where the issue was presented in Petitioner's cause.

STATUTES AND USAGES INVOLVED

> The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
>
> *Federal Rules of Criminal Procedure, Rule* 32(c)(1)

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests

prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Federal Rules of Criminal Procedure, Rule 30

STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury for the Western District of Kentucky for the crime of placing lives in jeopardy in robbing a postal substation and on May 31, 1967 his trial before a jury was initiated and completed and the case went to disposition that same day. At the close of all the evidence the trial court announced to the jury that final arguments would proceed immediately whereupon defense counsel protested that he had not anticipated such abruptness in the proceedings and the defense was awarded a five minute recess to prepare its final argument. Final arguments were then heard whereupon the trial court immediately delivered a 519 word charge to the jury which was as follows:

> Members of the jury, it is—you are the sole judges of the facts of this case, and you will take the facts as you find them to be and apply to those facts the law as I give it to you in this charge. Now the defendant in this case has been indicted by the grand jury and charged with the unlawful acts concerning which you've heard the evidence in this case. But the mere fact that this defendant has been indicted by the grand jury is not evidence of his guilt. An indictment is only a charge and guilt must be established by competent evidence to the exclusion of a reasonable doubt.

And the burden rests upon the United States to establish the guilt of this defendant beyond a reasonable doubt, and that burden never shifts but remains with the Government throughout the trial. And throughout the trial this defendant is surrounded with a presumption of innocence, and that presumption of innocence is evidence in his behalf and it remains with him throughout the trial and until such time as it may be removed, again by evidence which you believe to the exclusion of a reasonable doubt. What is a reasonable doubt? A reasonable doubt is a doubt based upon reason. It is not a mere misgiving or a vague, fanciful or possible doubt. Everything, as you ladies and gentlemen know, susceptible of human testimony is probably conducive of some doubt. It does mean a doubt based upon a substantial foundation as would prevent reasonable men and women after carefully considering all of the evidence or lack of evidence from having an abiding conviction to a moral certainty of the proof of the charge and the guilt of the accused. If the jury has a reasonable doubt of the guilt of this defendant, he is entitled to an acquittal. But if after considering all of the evidence or lack of evidence and giving the accused the benefit of a reasonable doubt you are led to the conclusion that the defendant is guilty as charged, you shall so say by your verdict. Now, you are familiar with the terms of this indictment. It is charged that on or about the 11th day of July at Louisville, that the defendant made an assault on Mrs. Effie R. Smith and Mrs. Grace Smith, persons having legal charge, control and custody of the United States Post Office here at 1612 Bardstown Road with intent to rob, steal and purloin mail matters, money and custody of the said Mrs. Smith, and in attempting to effect such robbery John McMillan Gregg put the life of Mrs. Effie R. Smith and Mrs. Grace Smith in jeopardy by the use of a dangerous weapon, a hand-held firearm, the exact description of which being to the grand jurors unknown. Now, ladies and gentlemen, if you believe from the evidence that this

defendant is guilty beyond a reasonable doubt of this charge, you shall so say by your verdict. If you do not so believe, you shall acquit him.

The trial court then asked in the presence and hearing of the jury if there were any objections to the charge and government counsel immediately replied in the presence and hearing of the jury that the government had none and then defense counsel stated that he had not been privy to the Court's intended instructions prior to the charge and that he did have written instructions to tender. The Court had counsel approach the bench and, after looking over the written, tendered instructions, the Court stated to the jury that it should not consider the fact that the Petitioner had not testified and that there was a prepared verdict form and that the Marshal should conduct the jury to the jury room. Immediately after the jury returned with its verdict the Court proceeded to disposition without recess or without any pause which would have permitted the Court to read or study anything subsequent to the return of the verdict. After a brief colloquy at the bench, defense counsel requested that a pre-sentence investigation be conducted.

Mr. Richards: Your Honor, I would like to ask that a pre-sentence investigation be made of—

By The Court: (Interrupting) A pre-sentence investigation has been made. It is before me now and I have read it.

The trial court then recited the petitioner's past conflicts with the law as reflected in the pre-sentence report and without hearing further from the defendant or the defense, sentenced the petitioner to twenty-five years imprisonment.

REASONS FOR GRANTING THE WRIT

1. The record before the Sixth Circuit presented an undeniable violation of the express provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure as the trial court went from receiving the jury's verdict to the passing of judgment without pause. From this the only conclusion that can be drawn is that the pre-sentence report was prepared prior to the Petitioner's trial which began and ended the same day and it was presented to and read by the trial court prior to the end of petitioner's trial contrary to the ex-provisions of the aforesaid rule of criminal procedure. The only question that remains is that of whether Rule 32(c)(1) is merely advisory or mandatory.

In *Calland* v. *United States,* 371 F.2d 295, 296 (1966) the Seventh Circuit held that the provisions of the said rule were to be considered mandatory and that a violation of the said rule should create a presumption of prejudice requiring reversal of any judgment based upon a trial which was completed subsequently to such a violation unless "the facts in the record before us effectually rebut the presumption of prejudice arising from the apparent violation of Rule 32(c)(1)." In the present case, the Sixth Circuit, while citing the *Calland* case, has held that a conviction and judgment under such a set of circumstances must be affirmed where "There is no basis for inferring prejudice from the facts that the District Judge had seen the pre-sentence investigation report prior to the time when the jury returned its verdict and that the District Judge sentenced defendant immediately thereafter."

It is submitted that the conflict between the conflict between the Sixth and Seventh Circuits is obvious on this point and it is further submitted that the fact that the said conflict involves a mere question of burden of proof

on appeal does not render this issue a mere technical issue. The question of burden of proof on appeal does, as a practical matter, resolve the question of whether the Federal Rules of Criminal Procedure and, more particularly, the above-cited rule is to be deemed advisory and not mandatory. If the Federal Rules of Criminal Procedure and Rule 32(c)(1) is to be considered mandatory and enforceable other than by its own inherent force of persuasion, it necessarily follows that where a trial-judge has perused the pre-sentence report prior to the conviction of a presumably innocent accused, such a premature perusal must require a reversal. The Sixth Circuit's holding that prejudice must be established in addition to the violation amounts to making the rule unenforceable. No criminal appellant or appeals court is in a position to read the mind of the trial judge in order to establish prejudice.

It further is submitted that there is manifest injustice in any judicial system which permits, condones or encourages the conducting of pre-sentence investigations prior to conviction without the consent of the accused. Where such an investigation which requires interviews of all friends and contacts of an accused is conducted, any innocent accused who subsequently is found not guilty necessarily suffers irreparable harm.

It is the Petitioner's position that the foregoing presentation demonstrates that not only does the question herein involve a conflict between circuits, it also involves a question of manifest social importance and a further question as to whether the supervisory powers of this Court should be invoked for the purpose of eliminating the practice of conducting pre-sentence investigations prior to conviction without the consent of the accused.

2. It likewise cannot be disputed that the charge given the jury in the trial of this cause did not include any recitation of the elements of the offense for which the Petitioner was being tried. There was a narrative recitation of the language of the indictment but all of the decisions cited hereinafter have found such recitations to be inadequate.

In *Merrill v. United States*, infra, *Byrd* v. *United States* infra, and *United States* v. *Harris*, infra, the Fifth, District of Columbia and Fourth circuits have held that it is plain error (even when invited) to give a charge without such an explanation of the elements of the offense as to make clear to a jury all of the facts which it must find beyond reasonable doubt before it may return a conviction.

> Although his counsel's argument was playing fast and loose with the court and jury—a practice we condemn—we cannot agree that his argument was in law a voluntary and understanding plea of guilty by the defendant, relieving the trial court of its duty to instruct the jury under Rule 30 F.R.Cr.P. on all of the essential elements of the offense charged, with an instruction on the presumption of innocence.
>
> *Merrill* v. *United States*, 338 F.2d 763, 767 (5th Cir. 1964)

> We hold, therefore, that the trial judge's omission to instruct the jury on every essential element of the crime was plain error under Rule 52(b) Fed. Rule Crim. P. By this omission, appellant's substantial right to have the jury pass on every essential element of the crime was prejudicially effected and a new trial is required.
>
> *Byrd* v. *United States*, 342 F.2d 939, 940, 941 (D.C. Cir. 1966)

> If Harris is reindicted and re-tried for a violation of Sec 2113(c), the submission should outline to the

jury the elements of the crime. That was not done here. The omission was not supplied by the reading of the statute to the jury. In every criminal prosecution, we have heretofore insisted, an exposition of the constituents of the offense is mandatory and indispensable. *Screws* v. *United States*, 325 U.S. 91, 106-107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945); *United States* v. *Hutchison*, 338 F.2d 991 (4th Cir. 1964).

United States v. *Harris*, 346 F.2d 182, 184 (4th Cir. 1965)

These decisions by the said circuits have been based upon this Court's decision in *Screws* v. *United States*, 325 U.S. 91, 106-107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) which latter decision did not go into the subject of whether errors of the sort which led to the said decision and reversal must be preserved by some formal act of defense counsel at the trial before they may be considered.

In its written order in this cause the Sixth Circuit disposed of the foregoing matter with the following summary statement: "Nor de we find any prejudicial error in the conduct of the trial or in the Court's instructions to the jury." (See Appendix A) It is urged that prejudice must be presumed where the trial court makes no attempt to outline the elements of the offense in delivering its charge to the jury in a criminal case and that the absence of tendered instructions on the point should be of no significance, especially under such circumstances as those heretofore outlined in Petitioner's Statement of the Case.

It also is urged that the scant charge of the trial court delivered after a reading of the Petitioner's pre-sentence report coupled with the abruptness with which the trial was brought to a conclusion constituted such a serious departure from the accepted and usual course of judicial proceedings that its sanctioning by the Sixth Circuit calls upon this Court to exercise its power of supervision.

CONCLUSION

It is urged that there is such conflict among the circuits as to require this Court's attention in the matter of the trial court's premature reading of the Petitioner's pre-sentence report contrary to the provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure and in the matter of the trial court's charge failing to advise the jury as to the essential elements of the subject offense and that the latter question has been resolved by the Sixth Circuit in a way probably in conflict with an applicable decision of this Court, i.e., *Screws* v. *United States,* supra, and that both matters taken together constituted a grave departure from the accepted and usual course of judicial proceedings and call upon this Court to exercise its power of supervision, particularly with respect to the proper implementation of Rule 32(c)(1).

It is, therefore, respectfully submitted that Certiorari should be granted and that the decision of the United States Court of Appeals for the sixth Circuit should be reversed; or in the alternative, that this Court should vacate said judgment and remand this cause to the United States Court of Appeals for the Sixth Circuit for further proceedings not inconsistent with an appropriate opinion.

Respectfully submitted,

DEAN E. RICHARDS
Attorney for Petitioner

PALMER K. WARD
Of Counsel

APPENDIX A

Before Weick, Chief Judge, Phillips and Edwards, Circuit Judges.

Appellant has no standing to question the search of a closet in an unrented room of a motel where he was hiding when he was arrested. In our judgment, the officers had probable cause to make the arrest and the search was incident thereto.

Nor do we find any prejudicial error in the conduct of the trial or in the Court's instructions to the jury. Venue was proven.

There is no basis for inferring prejudice from the facts that the District Judge had seen the presentence investigation report prior to the time when the jury returned its verdict and that the District Judge sentenced defendant immediately thereafter. *Calland* v. *United States*, 371 F.2d 295 (7th Cir. 1966), *cert. denied*, 388 U.S. 916.

The judgment of conviction is affirmed.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk